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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/081,483	02/22/2002	Robert Farr	F3284(C)	1491

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UNILEVER
PATENT DEPARTMENT
45 RIVER ROAD
EDGEWATER, NJ 07020

EXAMINER	
MADSEN, ROBERT A	
ART UNIT	**PAPER NUMBER**
1761	

DATE MAILED: 03/03/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/081,483	FARR ET AL.	
	Examiner	Art Unit	
	Robert Madsen	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-19 is/are pending in the application.

4a) Of the above claim(s) 19 is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-18 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date 08/26/02,9/23/02.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:

   I. Claims 1-18, drawn to an effervescent beverage product, classified in class 426, subclass 115.

   II. Claim 19, drawn to a method of making an effervescent beverage product, classified in class 426, subclass 494.

2. The inventions are distinct, each from the other because:

3. Inventions I and II are related as process of making and product made. The inventions are distinct if either or both of the following can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP § 806.05(f)). In the instant case, the effervescent beverage product as claimed can be made by another and materially different process, since one would not have to seal the container in order to produce an effervescent beverage.

4. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art because of their recognized divergent subject matter, restriction for examination purposes as indicated is proper.

5. During a telephone conversation with Edward Squillante on February 5,2004a provisional election was made with traverse to prosecute the invention of group I, claims 1-18. Affirmation of this election must be made by applicant in replying to this Office

action. Claim 19 is withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Claim Rejections - 35 USC § 102

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

7. Claims 1-3,7-9,12,15,16 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Kahan (US 3119695) .

8. See Column 3, line 20 to Column 4, line 3, Column 5, lines 25-30, Column 7, lines 16-47, Column 8, lines 24-45 and Figures 1-3.

9. Claims 1,3,4,7-9,12,15,16 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Walker (US 625,280)

10. See Page 1, lines 25-32,49-57, Page 1, line 75 to Page 2, line 21 and Figure.

11. Claims 1,2,5,6,7,9,15,16 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Ash (US 3063841).

12. See Column 1,lines 15-40, Column 1 line 60 to Column 2, line 2; Column 2, lines 22-70, Column 3, lines 17-21.

13. Claims 1-3,5,6,7,9,16 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Fox et al. (US 2977231).

14. See Column 2, lines 15-26, Column 2, line55-33, Column 9, lines 55-65,Column 17, lines 15-21, Examples 5-12,18-20.

15. Claims 1,3,5-9 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Steinberg et al. (US 3480185).

16. See Column 1, line 48 to column 2, line 2, Column 2, lines 41-45.

17. Claims 1,3,7,9,10,12,16 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Wery et al. (US 5607087).

18. See Column 4, lines 12-43, Column 5, line 65 to Column 6, line 9, and Column 7, lines 45-35, where air is the sparingly soluble gas comprising a mixture of nitrogen and oxygen.

19. Claims 1,3,7,12,16,17 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Doundoulakis (US 5110014).

20. See Abstract, Column 1, line 28 to column 2, line 61, column 3, line 25-column 4, line 5,and column 4, lines 26-50.

Claim Rejections - 35 USC § 103

21. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

22. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Wery et al. (US 5607087) in view of Bergman (SE9801752 A).

23. Wery et al. teach a water or juice-dispensing valve that is operated by biting, but is silent in teaching a button. Bergman also teaches a water dispensing valve operated by biting, but additionally utilizes a button to control the amount dispensed based on the bite pressure applied to the button (English Abstract). Therefore, it would have been obvious to modify Wery et al. and include a button on the bite-valve, since Bergman teaches this provides a means for controlling the dispensing amount by bite pressure and one would have been substituting one conventional bite-valve for another for the same purpose: dispensing water.

24. Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kahan (US 3119695) as applied to claims 1-3,7-9,12,15,16 above, further in view of Kohler et al. (US 5143288).

25. Kahan teaches an aerosol valve with a dip tube, but is silent in teaching the dip tube includes holes in communication with the headspace. Kohler et al. also teach an aerosol valve with a dip tube for a container holding a liquid and propellant. Kohler et al. teaches providing a hole in communication with the headspace of the container will assure that even though the liquid level of the container is reduced, the desired discharge pressure is maintained by allowing gas residing in the headspace to mix with the liquid as it travels up the dip tube, and that the actual location depends on the desired discharge consistency (Column 5, line 50 to Column 6, line 35) Therefore, it would have been obvious to include a hole in communication with the headspace of the container of Kahan since this would assure a more consistent amount of gas mixed with liquid in the discharge and one would have been substituting one conventional dip tube design for another for an aerosol valve.

26. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kahan (US 3119695) in view of Kohler et al. (US 5143288) as applied to claim 13 above, further in view of Berg Jr. et al. (US 3947567).

27. Kahan is silent in teaching the particular amount of gas discharged with the liquid. Berg et al. teach compositions for forming effervescent liquids . In explaining the particular desired degree of effervescence for products of Berg et al., Berg et al. teach

the conventional effervescent beverage which is 1 volume of gas per volume of liquid. (Column 4, line 39 to Column 5, line 16, Column 5, lines 62-66, Column 6, lines 5-53, and Column 6, line 62 to Column 7, line 4). Therefore, it would have been obvious to further modify Kahan such that the volume ratio of gas to liquid is at least 0.5 to 1 since Berg teaches the conventional effervescent beverage has a gas to liquid volume ratio is 1 to 1.

28. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Doundoulakis (US 5110014).as applied to claims 1,3,7,12,16,17 above, further in view of Rasmussen (WO9415871).

29. Doundoulakis teach adding a nitrogen filled widget to maintain the pressure and flavor (e.g. in the case of wines) during storage/use, but is silent in teaching the widget includes flavors. Rasmussen, who also teaches nitrogen filled widgets for beverage containers, is relied on as evidence of including non-gas ingredients (e.g. beverage) in addition to nitrogen (See Abstract, Page 11-2nd paragraph, Page 15-2nd and 3rd paragraphs). Thus, to further include flavoring in the widget of Doundoulakis would have been an obvious matter of choice since Doundoulakis teach the purpose of the widget is to improve flavor, and Rasmussen teaches other ingredients may be released from a widget in addition to the gases.

Double Patenting

30. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the

unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

31. A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

32. Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

33. Claims 1,3-6,9,15 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5,7 of copending Application No. 10/081,575. Although the conflicting claims are not identical, they are not patentably distinct from each other because '575 claims an effervescent beverage product coffee or tea product comprising soluble and sparingly soluble gas mixtures comprising oxygen that is suitable to be dispensed to a mouth of a consumer wherein the beverage occupies 30-96% of the container.

34. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

35. Claims 2,7,8,12, and 16 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5,7 of copending Application No. 10/081,575, as applied to claims 1,3-6,9,15 , further in view of Kahan (US 3119695).

36. '575 claims a coffee beverage with a head space of at least 2.5 atm that is dispensed via a valve, but '575 does not claim 5-15°C, the beverage can be dispensed over a period of time, the valve is an aerosol valve or includes a dip tube, and the container can be inverted with leaking as recited in claims 2,7,8,12, and 16.

37. Kahan also teaches a coffee beverage with a headspace of at least 2.5 atm that is dispensed via a valve. However, Kahan further teaches storing under refrigeration in the range of 5-15°C for an extended shelf life, and utilizing an aerosol valve , which includes a dip tube and is capable of inverting without leaking, for metering a desired volume (See Column 3, line 20 to Column 4, line 3, Column 5, lines 25-30, Column 7, lines 16-47, Column 8, lines 24-45 and Figures 1-3).

38. Therefore, it would have obvious to modify '575 and include refrigeration at 5-15°C, since Kahan teaches this will provide an extended shelf life. It would have been further obvious to include an aerosol valve, which includes a dip tube and can be inverted and remained sealed since Kahan teaches this design allows for metering of the coffee beverage, and one would have been substituting one conventional valve for another for the same purpose: dispensing an effervescent coffee beverage .

39. This is a provisional obviousness-type double patenting rejection.

40. Claim 13 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5,7 of copending Application No. 10/081,575 view of Kahan (US 3119695) , as applied to claims 2,7,8,12, and 16 further in view of Kohler et al. (US 5143288).

41. Modified '575 includes an aerosol valve with a dip tube, but does not claim the dip tube includes holes in communication with the headspace. Kohler et al. also teach an aerosol valve with a dip tube for a container holding a liquid and propellant. Kohler et al. teaches providing a hole in communication with the headspace of the container will assure that even though the liquid level of the container is reduced, the desired discharge pressure is maintained by allowing gas residing in the headspace to mix with the liquid as it travels up the dip tube, and that the actual location depends on the desired discharge consistency (Column 5, line 50 to Column 6, line 35) Therefore, it would have been obvious to further include a hole in communication with the headspace of the container of modified '575 since this would assure a more consistent amount of gas mixed with liquid in the discharge and one would have been substituting one conventional dip tube design for another for an aerosol valve. This is a provisional obviousness-type double patenting rejection.

42. Claim 14 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5,7 of copending Application No. 10/081,575 view of Kahan (US 3119695) and Kohler et al. (US 5143288), as applied to claim 13 above, further in view of Berg Jr. et al. (US 3947567).

43. Modified '575 does not claim the particular amount of gas discharged with the liquid. Berg et al. teach compositions for forming effervescent liquids . In explaining the particular desired degree of effervescence for products of Berg et al., Berg et al. teach

the conventional effervescent beverage which is 1 volume of gas per volume of liquid. (Column 4, line 39 to Column 5, line 16, Column 5, lines 62-66, Column 6, lines 5-53, and Column 6, line 62 to Column 7, line 4). Therefore, it would have been obvious to further modify '575 such that the volume ratio of gas to liquid is at least 0.5 to 1 since Berg teaches the conventional effervescent beverage has a gas to liquid volume ratio is 1 to 1. This is a provisional obviousness-type double patenting rejection.

44. Claims 10 and 11 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5,7 of copending Application No. 10/081,575, as applied to claims 1,3-6,9,15 , further in view of Bergman (SE9801752 A)

45. '575 claims a beverage comprising compressed air that is in a container with a valve that is suitable for dispensing to the mouth, but '575 does not claim that the valve is opened and closed by button. Bergman teaches dispensing a beverage providing a valve that is operated by a button such that the user bites down on the button provides a dispensing amount proportional to the biting pressure applied. Therefore it would have been obvious to modify '575 and include a bite valve that is operated by a button since Bergman teaches this provides a good control of the dispensing amount and one would have been substituting one conventional valve for another for the same purpose: providing a suitable means for dispensing a liquid into the mouth of a consumer.

46. Claims 17 and 18 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5,7 of copending Application No. 10/081,575, as applied to claims 1,3-6,9,15, further in of Rasmussen (WO9415871).

47. '575 claim a beverage container comprising nitrogen and alcoholic drinks, but is silent in teaching a widget operated by the valve that includes flavors. Rasmussen, who also teaches nitrogen filled alcoholic beverage containers, is relied on as evidence of including non-gas ingredients (e.g. beverage) in addition to nitrogen in a widget that is opened when the consumer dispenses the beverage so that an improved desired effervescence is achieved. (See Abstract, Page 11-2nd paragraph, Page 15-2nd and 3rd paragraphs). Therefore, it would have been obvious to include a widget comprising nitrogen that is released when the valve is opened since Rasmussen teaches adding nitrogen to a beverage via a widget would improve the effervescence when the beverage is dispensed. To include flavoring in the widget would have been an obvious matter of choice since Rasmussen teaches adding other ingredients from a widget in addition to the gases.

Conclusion

48. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.

49. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

50. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen
Examiner
Art Unit 1761

MILTON I. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700